a

THO YOW PEW & ANOR

v.

CHUA KOOI HEAN

b

HIGH COURT MALAYA, KUALA LUMPUR
RK NATHAN J
[CIVIL SUIT NO: S2-22-474-1997]
12 JANUARY 2001

c

SUCCESSION: *Probate - Testamentary capacity - Whether deceased had requisite testamentary capacity to execute will - Suspicious circumstances surrounding execution of will - Effect on testamentary capacity of deceased - Whether suspicion satisfactorily discharged by party propounding the will - Whether will valid - Whether probate should be granted*

d

The plaintiffs, who were the executors and trustees of a will executed by the deceased, commenced this probate action against the defendant, wife of the deceased, praying for the court to decree probate of the will in solemn form of law. The defendant counterclaimed seeking a declaration that the said will was null and void and prayed to be granted the letters of administration to the estate of the deceased.

e

Held:

[1] The burden of proving that the deceased had the requisite testamentary capacity, *ie* whether he was of "sound mind, memory and understanding" whilst executing the will, laid with the party propounding the will, which was the plaintiffs in this instance. (p 60 a)

f

[1b] In *Dr Shanmuganathan v. Periasamy*, it was emphasised that where there are suspicious circumstances lurking behind the execution of the will, the onus is on the party propounding the will, to remove, by way of explanations such suspicious circumstances. (p 60 b-c)

g

[2] The deceased suffered from nose cancer and was heavily dependant on a steroid drug called dexamethasone to obtain relief from its resultant pains and discomfort. Dexamethasone used long term can give rise to several physical and psychiatric side effects. There is also doubt that the deceased who experienced weakness of his limbs and muscles with reduced motor function could have typed the will in question. (pp 60 g, 62 g, 66 d-g)

h

i

[2b] The plaintiffs did not impress as having done what they did for the welfare and interest of the deceased. On the other hand, the defendant impressed as being a truthful witness. Her evidence was accepted as being the true version of the events that transpired. It was evident that the plaintiffs had not satisfactorily discharged the suspicion raised. (pp 67 b-d & 68 f)

[Plaintiffs' claim dismissed with costs; Defendant's counterclaim allowed with costs.]

Case(s) referred to:
Dr Shanmuganathan v. Periasamy Sithambaram Pillai [1997] 2 CLJ 153 ***(foll)***
Foo Fio Na v. Hospital Assunta & Anor [1999] 8 CLJ 184 ***(foll)***
Tyrrell v. Painton [1894] P 151 ***(foll)***
Udham Singh v. Indar Kaur [1971] 2 MLJ 263 ***(foll)***

Other source(s) referred to:
The Journal of Affective Disorders, 1983, vol 5 No 4, pp 319, 322

For the plaintiffs - Tan Beng Hong (Zurina Hayati Meah); M/s Zurina, Tan, Thanges & Co
For the defendant - Joy W Appukuttan (David KH Lee); M/s SK Yeoh & Jeganathan

Reported by Raja Vishnu Selvarajah

JUDGMENT

RK Nathan J:

Facts

One Dr. Tho Yow Cheong (deceased) died testate on 5 December 1996 and is survived by his wife (the defendant), his mother, his daughter and a son. By a will dated 20 October 1995 the deceased appointed the plaintiffs (his elder and younger brothers respectively) as his executors and trustees. On 16 June 1997 the plaintiffs applied to the High Court at Kuala Lumpur by way of Petition No. S1-32-200-97 for a grant of probate of the said will. On 10 July 1997 the defendant entered a caveat with the registry, thereby preventing the grant of probate to the plaintiffs without the defendant being given notice.

The Claim And Counterclaim

On 21 October 1997 the plaintiffs commenced this probate action against the defendant praying for the court to decree probate of the said will in solemn form of law. The defendant counterclaimed seeking a declaration that the said will is null and void and prayed that she be granted letters of administration to the estate of the said deceased.

Findings Of The Court

Testamentary Capacity Of The Deceased

It is trite law that the burden of proving that the deceased had the requisite testamentary capacity whilst executing the will lies with the party propounding the will and in this case, the plaintiffs (see *Udham Singh v. Indar Kaur* [1971] 2 MLJ 263 FC and *Dr. Shanmuganathan v. Periasamy s/o Sithambaram Pillai* [1997] 2 CLJ 153 FC). However, in *Dr. Shanmuganathan* the Federal Court emphasised that where there are suspicious circumstances lurking behind the execution of the will the onus is on the party propounding the will, to remove, by way of explanations, such suspicious circumstances. In order to test the testamentary capacity of the deceased it is necessary to establish that at the time of executing the will the deceased was of "sound mind, memory and understanding". The plaintiffs sought to argue that the deceased was of "sound mind, memory and understanding" when he executed the will. It is now necessary to test the evidence of two witnesses, namely, PW6 (Dr. Tsao) and DW1 (Dr. Sabri), so that the court can be satisfied that their evidence supported the plaintiffs' case that at the time of executing the will the deceased was of "sound mind, memory and understanding". There is clear documentary evidence that nearer the date of the execution of the will the deceased was having hearing loss, slurring of speech and double vision, amongst others. The deceased had been administering to himself the steroid Dexamethasone since February 1993 which DW1 said, was tantamount to describing it, as long term use. It is clear that the consequence of such long term use of this drug is to cause moon face, gastric bleeding, muscle weakness, wasting of the muscle, suppression of the immune system and resultant psychiatric effects including depression, insomnia, schizophrenia and psychological dependency. There is evidence that the deceased did indeed suffer the side effects of this drug. He was euphoric, had muscle weakness and suffered from psychiatric effect of the drug.

The Deceased's Illness

The deceased, a practising doctor with his own clinic, was diagnosed as having nasopharyngeal carcinoma (nose cancer) in 1984. He sought treatment in Hong Kong and was accompanied by the defendant. Fortunately, the treatment was successful and the cancer was eradicated. Immediately after his treatment was completed, the deceased resumed his work and all his usual activities. From 1984 onwards, as a precaution, the deceased went for regular check-up locally. The results were good and there was no indication of a relapse or a re-emergence of the cancer. Sometime in June 1991, the deceased's brother, one Tho Yow Pong (TYP), was also diagnosed with a similar type of nose cancer. TYP sought treatment in

Singapore under Dr. Tsao. While visiting his brother in Singapore, the deceased took the opportunity to show his own x-ray film and MRI scan to Dr. Tsao. After examining the x-ray and the scan, Dr. Tsao advised the deceased to have a biopsy done on a spot shown on the MRI scan. Unfortunately the biopsy showed the recurrence of cancer. The deceased went to Singapore for treatment under Dr. Tsao. His treatment was completed in September 1991. TYP unfortunately passed away in November 1991. Sometime in February 1992, five months after the deceased had completed the radiation therapy, he started to complain of headaches and insomnia. DW2 (the defendant) testified that the deceased described his headaches as excruciating, tearing and sharp cutting pains. The headaches made the deceased depressed and miserable. He could not sleep because of the severe pain. The deceased would be awake all night holding his head in pain. The deceased prescribed his own treatment and medication to relieve his headaches. The deceased started with Panadol and then switched to Ponstan, and Codeine which were much stronger analgesics. Following that in the same year, in his anxiety and depressive state, he also put himself on the following drugs such as Naprosen, Imovane, Ativan (Lorazepam), Diazepam, Lexotan and Dormicum (Midazolam). Eventually he also took Dexamethasone from February 1993 and found relief for his headaches, temporarily. Apart from Dexamethasone, PW5, his nurse at that time, during cross-examination confirmed that she had also seen the deceased taking Ponstan, Imovane, Ativan, Lexotan and Dormicum.

I have observed the witness PW5 and must note that where it was most necessary, her memory tended to fail her. For example, she described in detail everything that went on in the clinic but when it was put to her that she had expressed her concern to the defendant that the deceased was making careless mistakes in respect of prescriptions given to the patients, she tersely answered, "I can't recall." Surely if she did not have that conversation, she would have denied that suggestion from the defence. To another question as to whether she recalled informing the defendant that the deceased was making out cheques to drug companies and creditors mistakenly or incorrectly, she avoided the fact of her conversation with the defendant but admitted that there were times when the deceased had written figures wrongly and that the cheques had been returned for fresh cheques to be issued. Then surprisingly, she said, "I can't remember. Now I say I never told her." I cannot but conclude that this witness was not willing to tell the whole truth. Whilst the two experts and the medical journals referred to by the defendant described the headaches the deceased was suffering from as excruciating, this witness testified that when the deceased "had these headaches … he was normal and continued with his work and he can take the pain".

Dr. Tsao during cross-examination confirmed that based on the deceased's letter to him dated 20 October 1995 (the letter of 20th), wherein he had described his medical condition and history, the deceased was in possession of his mental faculty and that the deceased did not have any side effects of the radiation treatment nor did it appear that the deceased had any recurrence of nose cancer. Hence it was his view the deceased should not have any headaches. However, the deceased did continue to have the headaches, which became even more excruciating, severe and intense. According to the defendant, each night when the deceased came back from work, the pain was so severe that he was not able to sit down to take his meals and that the pain even made him cry. He had told her that the pain was so bad it was like someone tearing his head apart. It was continuous, persistent pain that kept him awake the whole night. The deceased himself explained the severity of his headaches in his letter to his son, wherein he described the intensity of the headaches which caused him to react violently by throwing pillows.

Since all the other drugs had failed to relieve the deceased of the severe headaches, the deceased began, sometime in February 1993, to treat his headaches with a steroid, namely Dexamethasone. The deceased described the effect of the drug as a "miracle" cure for his headaches. According to the defendant, the deceased started to take the drug orally and in smaller doses intravenously. Sometime in 1994 he started to take high doses as much as 24mg through intravenous injections because the tablets were becoming less effective. Despite taking the drug, the deceased only experienced temporary relief of his headaches. Although the deceased knew the dangerous side effects of the drug, he nevertheless continued to prescribe the drug for himself and over the years, the doses were constantly increased.

Side Effects Of Dexamethasone

Dexamethasone used long term can give rise to several side effects. Dr. Tsao during cross-examination confirmed that some of the side effects of the long term use of the drug are a moon face appearance, gastric bleeding, muscle weakness, wasting of the muscle, suppression of the immune system and other psychiatric effects. Dr. Tsao, after being referred to MIMS (pharmaceutical journal used as a general guide by practitioners) agreed that the use of Dexamethasone can cause depression, insomnia, aggravated schizophrenia and psychological dependency. He also agreed with MIMS that the drug can cause psychic disturbance that ranges from euphoria to psychotic manifestations. The above description of the side effects of Dexamethasone were confirmed by Dr. Sabri (DW1) during examination-in-chief. Dr. Sabri further gave evidence that there was no difference

between administering the drug intravenously or consuming the drug orally. The side effects would be the same. Dr. Sabri testified that the effect of Dexamethasone on a person would depend on his threshold for pain and his basic personality. That person could be aggressive or just succumb to pressure. The defendant gave evidence that the deceased did not have a high threshold for pain save with the use of Dexamethasone.

Deceased On Long Term Use Of Dexamethasone

The deceased has been taking the drug Dexamethasone since February 1993 until the day he executed the will on 20 October 1995 (some 2 1/2 years later) and continued to do so thereafter. This is described as a long term use of the drug. In fact MIMS suggests that the drug should be discontinued if there is no favourable response following two days of therapy. This was not the case with the deceased. He took the drug to relieve his headaches when this was not the treatment for such headaches.

Between 14 October 1995 to 20 October 1995, from the deceased's letter of 20th it can be seen that the deceased took high and mega dosages of Dexamethasone as follows:

(a) 14 October 1995 – The deceased give himself 20 mg of Dexamethasone.

(b) 16 October 1995 – The deceased was given 6 mg of Dexamethasone 4 times a day.

(c) 17 October 1995 – The deceased gave himself 10 mg of Dexamethasone intravenously twice a day.

(d) 18 and 19 October 1995 – The deceased administered to himself 24 mg of Dexamethasone.

At this point, not even 24 mg intravenous Dexamethasone was sufficient. The deceased complained that he still had headaches, and that he could not walk and felt giddy.

(e) 20 October 1995 – The day he executed the will he may have taken 100 mg of Dexamethasone as it was suggested by Dr. Tsao that he could take up to that dosage by his faxed reply dated 20 October 1995.

The deceased did give himself the Dexamethasone intravenously. PW2 gave evidence both in chief and in cross-examination, that the deceased administered the drug to himself that day. The deceased's doctor friends refused to administer the drug to him.

Although Dr. Tsao gave evidence during re-examination that the deceased may not have any side effects by 20 October 1995 because "there was not enough time for the side effects to develop" and that there was no damage to the deceased's brain and that the way to relieve the pressure was "by escalating doses of steroid", this evidence must be viewed with reservation.

The evidence of Dr. Tsao is not based on any physical examination of the deceased but was based solely on the deceased's letter to him of the 20th. Dr. Tsao never viewed the MRI scans but just read the faxed copy of the report. In this regard I agree with the view expressed by Mokhtar Sidin JCA (sitting as a High Court judge) in *Foo Fio Na v. Hospital Assunta & Anor* [1999] 8 CLJ 184 when his Lordship said at p. 202:

> … I am of the view that a doctor could not give any opinion what more an expert opinion as to the injury of any person without seeing and examining that person and also in the present case without seeing the x-rays of that person.

Dr. Tsao purported to give evidence that it was necessary to give the prescription through the fax because it was a life-threatening situation. But in the same breath he gave evidence that the deceased was not seriously ill. Dr. Tsao testified that the prescription was given because the deceased had hemiplegia and hemiparesis because of water retention in the temporal lobe, that is, that there was temporal lobe necrosis. Dr. Sabri who examined the deceased, gave evidence that the deceased was not in any life-threatening situation as alleged. He did not have hemiplegia. More importantly the deceased did not have temporal lobe necrosis as supported by the MRI scan.

Surely with such conflicting testimonies between both the medical witnesses, suspicion keeps piling against the plaintiffs' abject failure to explain these inconsistencies. What has to be considered primarily is that neither Dr. Tsao nor Dr. Sabri had ever seen the side effects on a patient who has been administered with 100mg of Dexamethasone let alone 50mg. Both admitted that they have only administered the maximum of 48mg and 34mg of Dexamethasone respectively in their practice.

The Journal of Affective Disorders vol. 5 No. 4 November 1983 p. 319 at p. 322 published the results of steroid induced psychiatric syndromes. In this journal it is reported that during the duration of treatment with steroids from one day to 54 days, where the median duration of treatment was 11 days, 43% of the cases developed symptoms during the first week of treatment, 57% within the first two weeks and 93% within six weeks of the initiation of steroid therapy. The table at p. 322 of the journal shows the presence of psychotic features in patients treated with steroid. What

then was the effect of such high and mega dosages on the deceased? Did he have the side effects after the use of the drug? Indeed the side effects of the drug did manifest in the deceased. In an entry in his diary dated 7 December 1994 the deceased admitted that the use of the drug caused euphoria. Dr. Sabri testified that this euphoria is an induced state of happiness not founded on reality, which can impair the mental faculty or rationality of a person. It was his view that euphoria could even occur after the first dose was administered. PW3 who witnessed the will said that the deceased was happy after executing the will and that soon thereafter all parties "adjourned downstairs for some snacks. He was cheerful and chatty. For the first time he looked a happy man." I must consider this witness's evidence in the light of the deceased's own pathetic letter to PW6. This was a lengthy letter written on 20 October 1995, the same day the will was executed by the deceased. In the letter of the 20th to PW6 and marked urgent, the deceased cries for help. He says he tried ringing PW6 the night before, but could not get through. He admits suffering from right hemiparesis. He gives a day to day breakdown of his suffering. On 20 October 1995 when that letter was faxed to PW6 the deceased complains of headache, that he can't walk, that he feels giddy and that he could not even eat porridge. He is desperate to know the actual dosage of Dexamethasone he has to take to relieve himself of the pestilent headache. Yet PW3, the witness to the will executed on the same day, says that the deceased was happy, cheerful and walked down the stairs for snacks when on the deceased's own admission, he could not even take porridge. These are the issues that the plaintiffs have failed to respond to.

I am satisfied after perusing all the evidence that the long-term effect of the drug had caused the deceased psychiatric problems. The deceased complained to his daughter, DW3, through letters that the defendant's love for him as a wife was doubtful. However, when DW3 spoke to the deceased over the telephone, the deceased described his normal daily activities with the defendant which included going out shopping together, having meals and singing karoke together. The deceased complained to his daughter, DW3, that the defendant was taking his money. However, this was not possible because the deceased was in sole control of all his income and finances. The deceased would create a mini home in a room and act solitary believing that he would not want to disturb the defendant in spite of the defendant's assurances that he never disturbed her. The deceased refused to eat the food prepared by the defendant because he believed that the defendant was trying to poison him.

It is obvious that the deceased had become physically and psychologically dependent on Dexamethasone. The deceased believed that the cause of his headaches was the swelling in his brain caused by temporal lobe necrosis. However, repeated biopsies and scans showed no evidence that the deceased had temporal lobe necrosis. Even DW1 confirmed this. Nevertheless, it was the deceased's belief that the only way he could find relief from his severe and intense headaches was by resorting to Dexamethasone. It is an accepted medical fact that Dexamethasone is not a drug that cures headaches.

Could The Deceased Type?

During the crucial period that is from 14 October 1995 to 20 October 1995, the deceased suffered from weakness of his limbs and muscles. DW1 testified that the deceased was admitted to Subang Jaya Medical Centre for mild weaknesses of the leg. The deceased's letter of the 20th states that he had hemiparesis with 30% - 40% motor function. Hemiparesis is described by Dr. Tsao as "weakness of one side of the body, namely, the upper and lower limbs". According to PW6 this meant that the deceased's muscle strength was less than what it should have been and that he could only walk with much support. What is of importance for the court to note is that it was Dr. Tsao's view that the deceased, in this condition, could only write slowly and not type. A perusal of the will shows that it was typed. Both the witnesses to the will testified that they did not know who prepared the will. Certainly, the deceased with only 30% - 40% motor function and with the headaches he was undergoing was in no position to have typed the will. Another interesting factor was that the hemiparesis affected the right side of the body. Evidence was led that the deceased was a right hander but no evidence was led to show whether the deceased could type with his left hand. I am satisfied that there are clear nagging doubts as to whether the deceased actually typed the will. Since his daughter testified that the deceased was a careful man I cannot understand why the deceased did not seek the assistance of a solicitor in order to prepare the will.

Even DW1 could not make any positive statement of the deceased's mental capabilities at the time of executing the will. Dr. Sabri was of the view that it was necessary to do clinical tests to examine the deceased before arriving at a conclusion between the relationship of rationality and mental capability. At the time of making the will the deceased was staying with the 2nd plaintiff. The defendant was not allowed to go anywhere near the deceased. Hence the defendant had no opportunity to seek any clinical examination of the deceased's condition and state of mind. In fact there is clear evidence that the defendant and her daughter were not even informed of the deceased's admission to Subang Jaya Medical Centre.

When they heard of his admission and went to see him they were chased out of the room in which the deceased was. Soon thereafter the deceased was even removed from that hospital without the defendant's knowledge. Finally I cannot understand nor has it been explained satisfactorily why the deceased was not even allowed to speak to the defendant over the phone or be allowed to visit him.

I have watched the defendant and the two plaintiffs give evidence. The plaintiffs did not impress me as having done what they did for the welfare and interest of the deceased. In fact, at times the 2nd plaintiff testified light-heartedly requiring the court to remind him of the seriousness of the case. Whereas on the other hand, the defendant impressed me as a truthful witness. Throughout the many days of trial, I watched her and noted her calm composure and the modulated manner in which she testified. There were times her evidence evoked a perceptible wince from her counsel at her forthrightness and in stating matters that were unfavourable to her. I accept her evidence as being the true version of the events that transpired throughout her tempestuous relationship with the deceased. I cannot understand that the deceased could have willingly and knowingly given his wife a contemptuous one Ringgit Malaysia. There is no doubt that there was no love lost between the deceased's brothers and mother on the one side and the wife and children on the other. I am satisfied that the events including the allegations of the use of bomohs and charms were nothing more than a catalytic tool used by the plaintiffs to alienate the deceased from his wife and children. Besides, the signature on the will is nothing more than a scrawl and I reject the testimony of PW3 whose evidence of a clear-minded executor of the will happily walking down the steps to join in snacks after executing the will, is not borne out by the deceased's own letter declaring his state of affairs on the very day he executed the will.

As for the other witness, PW4, who attested the will, I could not help but note that he was being evasive under cross-examination. He was asked a relevant question about a dinner which he attended and where the deceased had spoken to him of his family problems. He evaded the question until my notes show that I had to repeat the same question twice to him before he said yes. PW3, the first attesting witness, said he did not read the will to the deceased at all. The second attesting witness, PW4, never testified on this at all. Doubts remain as to who in fact typed the will. The deceased was suffering from right-sided hemiparesis and he was right handed. He was under mega dosage (100mg) of Dexamethasone and in my judgment would have been in no condition to have typed the will. No explanation has been proffered by the plaintiffs as to the will, such as, who prepared it and whether it was read over to the deceased. In fact PW6, when asked

specifically if with the advent of hemiparesis the deceased could type or write, answered that he could write slowly. In other words, he could not type. I do not accept the evidence of PW3 who testified that the deceased told him that he owed his mother money and that was why he had left the lion's share of his estate to her. When defence counsel informed him that in the declaration of the deceased's assets in order to obtain probate, the plaintiffs had made no disclosure of any monies due and owing to the mother, this witness volunteered an explanation that the deceased wished to repay the expenses incurred by the brothers when the deceased was living with them. This does not explain why he had to leave the estate to the mother. Besides the plaintiffs could have expended money on the deceased due to fraternal love.

I am satisfied that all these issues I have touched upon give reasons for suspicion in respect of the will. As said by Lindley LJ in *Tyrrell v. Painton* [1894] P 151 at p. 157:

> The rule in *Barry v. Butlin* 2 Moo PC 480, *Fulton v. Andrew* LR 7 HL 448 and *Brown v. Fisher* 63 LT 456, is not, in my opinion, confined to the single case in which a will is prepared by or on the instructions of the person taking large benefits under it, but extends to all cases in which circumstances exist which excite the suspicion of the Court; and wherever such circumstances exist and whatever their nature may be, it is for those who propound the will to remove such suspicions, and to prove affirmatively that the testator knew and approved of the contents of the document, and it is only where this is done that the onus is thrown on these who oppose the will to prove fraud or undue influence, or whatever else they rely on to displace the case made for proving the will.

I am constrained to hold that the suspicion that has been raised has not been satisfactorily discharged by the plaintiffs. On this ground alone I have no hesitation in dismissing the plaintiffs' claim with costs and to allow the defendant's counterclaim also with costs. I do not see the need to look into the other issues of undue influence and coercion as raised by the defence.